Norma bt Awang Had (suing as the administrators/executors of the estate of Tan Sri Dato' Dr Awang Had bin Salleh, deceased) & Ors v Dato' Dr Hj Mohamed Haniffa bin Hj Abdullah

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(IM)(NCVC)-1573–09 OF 2015

ZAWAWI SALLEH, VERNON ONG AND ABDUL RAHMAN SEBLI JJCA

C

12 AUGUST 2016

Civil Procedure — Estoppel — Cause of action estoppel — Respondent applied to strike out appellants' action on ground of cause of action estoppel and/or abuse of process — Whether appellants guilty of abuse of process of court — Whether court could strike out action on ground of abuse of process — Whether action barred by cause of action estoppel and/or abuse of process — Rules of Court 2012 O 18 r 19

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The Kuala Lumpur High Court had previously dismissed the appellant's claim against the respondent in Consolidated Suit No 1412 due to the failure of the appellants to confine their revised pleadings to the preserved claims as agreed between the parties ('terms of 18 January 2008') and also due to the 'contumelious conduct' on the part of the appellants. The appellants' appeal to the Court of Appeal was struck out and leave was refused by the Federal Court. The appellants subsequently filed another separate action that was now the subject of the present appeal. The respondent's application to struck out the appellants' claims pursuant to O 18 r 19 of the Rules of Court 2012 ('the ROC') and/or inherent jurisdiction of the court on the ground that it was barred by a cause of action estoppel and/or an abuse of process on the part of the appellants was allowed by the trial judge, hence this appeal. The appellants submitted that the learned trial judge failed to undertake a minute examination of the prior proceedings and thus had misdirected himself on the issue of cause of action estoppel. The appellants further submitted that the learned trial judge erred when His Lordship merely referred to the form of order which carried a notation 'dismissed and struck out' without considering the circumstances in which the order was given therefore misdirected himself on the issue of cause of action estoppel. The respondent opposed the appeal and submitted that the learned trial judge rightly held that the terms of 18 January 2008 was the undoubted agreement of the parties that the outstanding cause of the appellants' claims were to be determined in Consolidated Suit No 1412. The respondent also submitted that the court should take into consideration that the previous proceedings were terminated on the basis of contumelious conduct of the appellants. The issue in the present appeal was whether the

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learned judge correctly exercised his discretion in allowing the respondent's application to struck out the appellants' claims.

Held, dismissing the appeal with costs of RM20,000 subject to allocator and affirming the decision of the learned trial judge:

(1) The appellants were guilty of abuse of the process of the court because of 'contumelious conduct' on the part of the appellants. The court has a discretion to strike out a case as an abuse of process where there has been contumelious conduct on the part of the claimant, that is to say, conduct which shows a deliberate failure to comply with specific orders of the court, or where the claimant was guilty of a series of separate, inordinate and inexcusable delays, in complete disregard of the ROC (see paras 28–29).

(2) The cause in Consolidate Suit No 1412 had been previously determined by the Kuala Lumpur High Court by an order of recording dismissal. The present action was in fact no more than a repetition, in thinly veiled new guise of the cause of earlier proceedings in Consolidated Suit No 1412 which had been struck off and dismissed. Thus, based on the entire factual matrix of the case, the present suit was barred by a cause of action estoppel and/or an abuse of the court process on the part of the appellants (see paras 27, 30 & 32).

[Bahasa Malaysia summary

Mahkamah Tinggi Kuala Lumpur telah terdahulunya menolak tuntutan perayu terhadap responden dalam Guaman Gabungan No 1412 akibat kepada kegagalan perayu-perayu untuk membataskan pliding semakan mereka kepada tuntutan terpelihara seperti yang dipersetujui di antara pihak-pihak ('terma 18 Januari 2008') dan juga akibat 'contumelious conduct' oleh pihak perayu-perayu. Rayuan perayu-perayu kepada Mahkamah Rayuan dibatalkan dan izin ditolak oleh Mahkamah Persekutuan. Perayu-perayu kemudiannya memfailkan tindakan berasingan yang lagi satu yang mana adalah perkara rayuan ini. Permohonan responden untuk membatalkan tuntutan perayu-perayu berikutan kepada A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 2012 ('KKM') dan/atau bidang kuasa inherens mahkamah atas alasan bahawa ia dihalang oleh kausa tindakan estopel dan/atau penyalahgunaan proses oleh pihak perayu-perayu dibenarkan hakim perbicaraan, maka rayuan ini. Perayu-perayu berhujah bahawa hakim perbicaraan yang bijaksana gagal untuk membuat pemeriksaan prosiding sebelumnya dan oleh itu telah tersalah arah dirinya atas isu kausa tindakan estopel. Perayu-perayu selanjutnya berhujah bahawa hakim perbicaraan yang bijaksana tersilap apabila Yang Arif hanya merujuk kepada bentuk perintah yang mana membawa notasi 'dismissed and struck out' tanpa mempertimbangkan keadaan di mana perintah tersebut diberikan oleh itu tersalah arah dirinya atas isu kausa tindakan estopel. Responden menentang rayuan dan berhujah hakim perbicaraan yang bijaksana

memutuskan dengan betul bahawa terma-terma 18 Januari 2008 adalah perjanjian yang tidak diragui pihak-pihak bahawa kausa yang belum diselesaikan terhadap tuntutan perayu-perayu adalah ditentukan dalam Guaman Gabungan No 1412. Responden juga berhujah bahawa mahkamah patut mengambil kira bahawa prosiding terdahulu ditamatkan atas dasar tingkah laku menghina perayu-perayu. Isu dalam rayuan ini adalah sama ada hakim yang bijaksana menjalankan budi bicaranya secara betul dalam membenarkan permohonan responden untuk membatalkan tuntutan perayu-perayu.

Diputuskan, menolak rayuan dengan kos sebanyak RM20,000 subjek kepada alokatur dan mengesahkan keputusan hakim perbicaraan yang bijaksana:

(1) Perayu-perayu adalah bersalah terhadap penyalahgunaan proses mahkamah kerana 'contumelious conduct' oleh pihak perayu-perayu. Mahkamah mempunyai budi bicara untuk membatalkan kes sebagai penyalahgunaan proses di mana terdapat tingkah laku menghina oleh pihak penuntut, iaitu, tingkah laku yang mana menunjukkan kegagalan sengaja untuk mematuhi dengan perintah spesifik mahkamah, atau di mana penuntut adalah bersalah terhadap kelewatan berasingan, keterlaluan dan tidak dapat dimaafkan berturut-turut, dalam tidak memperdulikan langsung KKM tersebut (lihat perenggan 28–29).

(2) Kausa dalam Guaman Gabungan No 1412 telah terdahulunya ditentukan oleh Mahkamah Tinggi Kuala Lumpur oleh perintah penolakan rakaman. Tindakan ini sebenarnya tidak lebih daripada pengulangan, dalam samaran baru yang diselubung nipis kausa prosiding terdahulu dalam Guaman Gabungan No 1412 yang mana telah dibatalkan dan ditolak. Oleh itu, berdasarkan matriks fakta keseluruhan kes, tindakan ini dihalang oleh kausa tindakan estopel dan/atau penyalahgunaan proses oleh pihak perayu-perayu (lihat perenggan 27, 30 & 32).]

Notes

For a case on cause of action estoppel, see 2(2) *Mallal's Digest* (5th Ed, 2015) para 3356.

Cases referred to

Arthur J S Hall & Co (a firm) v Simons [2000] 3 All ER 673, HL (refd)
Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 CLJ 189, SC (refd)
Brisbane City Council v A-G for Queensland [1979] AC 411, PC (refd)
Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 3) [1970] Ch 506, Ch D (refd)
Henderson v Henderson [1843-60] All ER Rep 378 (refd)
Hunter v Chief Constable of West Midlands and Another [1981] 3 All ER 727, HL (refd)

A *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481, HL (refd)
Lace Co-ordinates Ltd v NEM Insurance Co Ltd [1998] All ER (D) 610, CA (refd)
Securum Finance Ltd v Ashton [2000] 3 WLR 1400, CA (refd)
Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors [2012] 1 MLJ 473; [2012] 1 CLJ 75, CA (refd)
B *Wallis v Valentine* [2002] EWCA Civ 1034, CA (refd)

Legislation referred to

C Rules of Court 2012 O 18 r 19

Appeal from: Civil Suit No 22NCVC-72–02 of 2014 (High Court, Shah Alam)

D *Harpal Singh Grewal (Lim Choon Kim and Reny Rao with him) (Chooi, Saw & Lim) for the appellants.*
Cyrus Das (Logan Sabapathty, Tharminder Singh and Alithea Wong with him) (Logan Sabapathy & Co) for the respondent.

E **Zawawi Salleh JCA (delivering judgment of the court):**

INTRODUCTION

[1] This is an appeal against the judgment and order of Ahmad Zaidi Ibrahim J, delivered on 12 August 2015, in which the learned judge allowed the respondent's application to strike out the appellants' claims pursuant to O 18 r 19 of the Rules of Court 2012 and/or the inherent jurisdiction of court, on the basis that it is barred by a cause of action estoppel and/or an abuse of process on the part of the appellants.

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[2] Cause of action estoppel was asserted on the basis that the present action filed by the appellants in the High Court represents no more than a repeat of the earlier cause, namely Consolidated Suit No 1412. The said cause was determined by the Kuala Lumpur High Court on 3 November 2011 when the H court adjudged and ordered that the appellants' claims be struck off and dismissed. The order of the Kuala Lumpur High Court was affirmed by the Court of Appeal and an application for leave was refused by the Federal Court.

I **[3]** The appellants disagree and say that the learned judge's decision was wrong and vigorously submit that in the interest of justice the present action should proceed to trial.

[4] The principal issue in this appeal is whether the learned judge correctly exercised his discretion in allowing the respondent's application to strike out the appellants' claims having regard to the factual matrix of the case.

[5] For the reasons that follow, we dismiss the appeal and affirm the decision of the learned judge.

THE FACTS

[6] The facts of the case, as submitted by parties, may be summarised as follows:

(a) the appellants were minority shareholders in a company known as Anjur Dinamik Sdn Bhd ('ADSB'), holding 29.2% of the shares while the respondent directly or indirectly held the balance of 70.89%;

(b) in 2003, the appellants and other parties filed several proceedings against the respondent in the High Court at Kuala Lumpur which were consolidated with Kuala Lumpur High Court No D2–22–1412 of 2003 ('Consolidated Civil Suit No 1412');

(c) in the mid-stream of trial of Consolidated Suit No 1412, terms of settlement were agreed by the parties pursuant to an exchange of letters dated 18 January 2008 between the parties' solicitors ('terms of 18 January 2008'). It was agreed that only the following claims will be tried, namely, the secret profit and gratification claims on the benefit had by:

  (i) One Taiplus Trading Sdn Bhd ('Taiplus'), in its dealing with one Healthpac Industries Sdn Bhd ('HISB'); and

  (ii) Haniffa, in connection with what has been termed by Haniffa's solicitor as 'the Mentoria Transaction' ('the preserved claims');

(d) from the terms of 18 January 2008, the following is not in dispute:

  (i) the appellants received a sum of approximately RM16m from the respondent (excluding a further sum of approximated RM1.5m paid separately); and

  (ii) except for preserved claim, the appellants had expressly agreed to 'abandon all other claims made or could be made with reference to the cause of action pleaded' in Consolidated Suit No 1412 upon revised pleadings to be delivered in that pending proceedings;

(e) thereafter, a dispute arose as to whether or not the appellants were in breach of the terms of 18 January 2008 by refusing to confine their revised pleading to the agreed preserved claims;

(f) the appellants filed a revised statement of claim in English on 5 February

2010 and Malay version on 19 September 2011, respectively. In their revised statement of claim, the appellants continued to name four other parties in addition to the respondent as co-defendant. Two applications were then filed by these defendants; one by the four defendants for an order that they were to be removed from Consolidated Suit No 1412, and another by the respondent herein to strike out Consolidated Suit No 1412 on similar grounds;

(g) on 1 July 2007, the Kuala Lumpur High Court allowed both applications and struck out the four defendants as parties and also dismissed and struck out the writ and statement of claim;

(h) the appellants abandoned their appeal to the Court of Appeal against the said decision of the Kuala Lumpur High Court;

(i) on 20 November 2009, the Kuala Lumpur High Court then determined the ambit of the terms of 18 January 2008 with the result that the appellants were required to file revised pleadings confined only to preserved claims;

(j) the appellants' appeal to the Court of Appeal against the said decision of the Kuala Lumpur High Court was struck out by the Court of Appeal on 21 July 2011 and leave was refused by the Federal Court on 7 December 2011;

(k) according to the respondent, despite the position arising from the above, the appellants refused to confine their revised pleadings to the preserved claims whilst embarking on a series of tactical manoeuvres with the following then further arising:

(i) on 3 November 2011, the Kuala Lumpur High Court, upon a complaint by the defendant on a formal application then terminated the appellants' claim in Consolidated Suit No 1412 by entering an order of dismissal.

In its grounds of judgment, the Kuala Lumpur High Court essentially took cognisance of the 'other collateral avenues in the conduct' of the appellants apart from what was recognised as obvious 'contumelious conduct' on the part of the appellants; and

(ii) on 23 July 2012, the Court of Appeal dismissed the appellants' appeal against the said decision of the Kuala Lumpur High Court on 3 November 2011. In its ground of judgment, the Court of Appeal recognised the conduct of the appellants as one 'constituting abuse of process'. The appellants' application for leave to appeal to the Federal Court was refused by the Federal Court on 5 February 2013;

(l) the respondent further alleged that despite the position arising from the above, the appellants then sought thereafter to re-agitate a claim against the defendant through an application to add the defendant to an existing action. The Kuala Lumpur High Court described that application by the appellants as a 'colourable application' that had been pursued for false reasons given what had obviously 'transpired in the 1412 suit', namely, the said dismissal order of 3 November 2011 that had been made in Consolidated Suit No 1412;

(m) on 27 January 2012, the respondent sought an injunction in Consolidated Suit No 1412 to have the High Court regulate any further actions by the appellants by way of a restraint subject to leave of the High Court. On 18 February 2013, the High Court refused the application; and

(n) in January 2013, the appellants brought the action that is now the subject of the present appeal.

THE APPEAL

[7] The appeal is advanced on two main grounds. First, learned counsel for the appellants submitted that the learned judge failed to undertake a minute examination of the prior proceedings and therefore had misdirected himself on the issue of cause of action estoppel. The learned judge failed to appreciate that what was decided in encls 322 and 362 was the issue of misjoinder and the decision did not conclusively determine the rights of the parties with regards to all the matters in controversy in statement of claim.

[8] Learned counsel further submitted that the inclusion of the four defendants in Consolidated Suit No 1412 was a legitimate exercise in compliance with the Rules of Court 2012 as they were not parties to the terms of 18 January 2008 but nevertheless involved in the wrong doing of the respondent herein.

[9] The second stand of learned counsel for the appellants was that the learned judge erred when His Lordship merely referred to the form of the order which carried a notation 'dismissed and struck out' without considering the circumstances in which the order was given and therefore misdirected himself on the issue of cause of action estoppel. Learned counsel complained that the complete cause papers in Consolidated Suit No 1412 were not made available to the learned judge. Enclosures 327 and 362 and all the supporting affidavits, documents, submissions and so on were not made available to the learned judge.

[10] The respondent opposed the appeal. Learned counsel submitted that the learned judge rightly held that the terms of 18 January 2008 was the undoubted agreement of the parties that the outstanding cause of the appellants' claims were to be determined in the Consolidated Suit No 1412. It is undisputed that the dismissal order made by the Kuala Lumpur High Court on 3 November 2011 in the said Consolidated Suit No 1412 gave rise to a cause of action estoppel and/or an abuse of process on the part of the appellants.

[11] Concerning the issue that the complete cause papers in Consolidated Suit No 1412 were not made available to the learned judge, learned counsel submitted that since the Shah Alam High Court was bound by the previous finding of conduct by the Kuala Lumpur High Court which was upheld by the Court of Appeal, there is neither basis nor justification for requiring the Shah Alam High Court to trawl through the cause papers in the previously dismissed Kuala Lumpur High Court action to determine whether there was abuse of process in the first place. In any event, encls 327 and 362 were produced in the course of submissions by the appellants.

[12] In the respondent counsel's note of submissions, 'contumelious conduct' of the appellants was raised. It was asserted that the previous proceedings between the parties were terminated first by the Kuala Lumpur High Court on the basis of contumelious conduct of the appellants. The finding of the High Court was upheld by the Court of Appeal confirming that there was tainting of proceedings on account of abuse. Learned counsel urged this court to take into consideration of this finding in deciding the instant appeal.

OUR FINDINGS

[13] It is not in dispute that the decision to strike out a suit or pleading is a discretion bestowed upon the trial court; however, such discretion must be judiciously exercised. We take cognisance of the judgment of Ramly Ali JCA (as he then was) in *Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors* [2012] 1 MLJ 473; [2012] 1 CLJ 75 wherein His Lordship said:

> It is trite that a striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. It should also not be made if there is issue of fact that is capable of resolution only after taking viva voce evidence during trial (see *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565; [1997] 3 CLJ 305 — Federal Court). The test for striking out as laid down by the Supreme Court in *Bandar Builder*'s case is that the claim on the face of it must be 'obviously unsustainable'. The stress is not only on the word 'unsustainable' but also on the word 'obviously' ie, the degree of unsustainability must appear on the face of the claim without having to go into lengthy and mature consideration in detail. If one has to go into a lengthy and mature consideration in detail of the issues of law and/or fact, then the matter is not appropriate to be struck

out summarily. It must be determined at trial. A

[14] Having said that, we hasten to add that under O 18 r 19 and/or the inherent jurisdiction, a court is conferred with the powers to summarily arrest the abuse of re-litigating spent causes (see *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 at p 198; [1995] 3 CLJ 189 at p 796; *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 3)* [1970] Ch 506 at p 537). B

[15] It is trite law that a party should not be allowed to re-litigate a matter that has already been litigated. The learned authors of *Halsbury's Laws of England*, Vol 12A, 2015, para 1651 have said: C

> The law discourages re-litigation of the same issues except by means of an appeal. It is not in the interests of justice that there should be re-trial of a case which has already been decided by another court, leading to the possibility of conflicting judicial decisions, or that there should be collateral challenges to judicial decisions; there is a danger, not only of unfairness to the parties concerned, but also of bringing the administration of justice into disrepute. D

[16] We refer to two decided cases to illustrate the point. In the case of *Hunter v Chief Constable of West Midlands and Another* [1981] 3 All ER 727, the brief facts are these. Six men claimed they were beaten by police to confess a bombing. The confessions were admitted into evidence following a voir dire in which the learned judge found that the prosecution had proved beyond a reasonable doubt that the men were not beaten. Leave to appeal was refused and thereafter the men commenced proceedings against the police officers for assault, alleging the same beatings as had been alleged in the criminal trial. The House of Lords held that it was an abuse of the process of the court to attempt to re-litigate the same issue and the actions were struck out. Lord Diplock at p 72 of the judgment said the court has an inherent power to 'prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to a litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people'. E F G

[17] In the case of *Arthur J S Hall & Co (a firm) v Simons* [2000] 3 All ER 673, the brief facts are that clients brought claims for negligence against their former solicitor in three separate cases and these claims were struck out based on the solicitors reliance on the immunity of advocates from suits for negligence. The Court of Appeal in allowing the three appeals, held that these claims fell outside of the scope of the immunity and should not have been struck out. On appeal to the House of Lords, Their Lordships had to determine, inter alia, whether to abolish the immunity from actions in negligence enjoyed by advocates. One argument in support of the retention of this immunity was that it was still justified in the public interest to prevent H I

collateral attacks on decisions of the court where litigants blamed their attorneys for the outcome of their cases increasing the possibility of conflicting judgments. The House of Lords, by a majority, dismissed the appeals and abolished the immunity, Lord Hoffmann at p 703 of the judgment, acknowledged that there is a public policy against re-litigating a decision of a court of competent jurisdiction where he said:

> The law discourages litigation of the same issues except by means of an appeal. The Latin maxims often quoted are *nemo debet bis vexari pro una et eadem causa* and interest *rei publicae ut finis sit litium.* They are usually mentioned in tandem but it is important to notice that the policies they state are not quite the same. The First is concerned with the interest of the defendant: a person should not be troubled twice for the same reason. This policy has generated the rules which prevent relitigation when the parties are the same: *autrefois acquit, res judicata* and issue estoppel.
>
> The second policy is wider: it is concerned with the interests of the state. There is a general public interest in the same issue not being litigated over again.

He nonetheless stated at p 703 that the possibility of re-litigation is not a sound basis for giving attorney's immunity from actions for negligence since:

> ... not all relitigation of the same issue will be manifestly unfair to a party or bring the administration of justice into disrepute, and secondly, that when relitigation is for one or other of these reasons an abuse, the court has power to strike it out.

[18] In the appeal before us, the respondent has urged this court to dismiss the appeal based on the principle of res-judicata and/or an abuse of the process of the court.

[19] Now, the doctrine of res judicata in the modern law comprehends three distinct components which nevertheless share the same underlying public interest that there should be finality in litigation and that a party should not be twice vexed in the same matter. The three components are:

(a) cause of action estoppel, which where applicable, is an absolute bar to re-litigation between the same parties or their privies;

(b) issue estoppels, where applicable, also prevents the reopening of particular points which has been raised and specifically determined in previous litigation between the parties, but is a subject to an exception in special circumstances; and

(c) *Henderson v Henderson* [1843-60] All ER Rep 378 abuse of process, which gives rise to a discretionary bar to subsequent proceedings, depending on whether in all the circumstances, taking into account all the relevant facts and various interest involved, 'a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before' (per Lord Bingham, in *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481 at p 499).

[20] In the appeal before us, the respondent relies on cause of action estoppel. Jeffrey Pinsler SC in *Principles of Civil Procedure, Singapore: Academy Publishing, 2013*, had this to say on cause of action estoppel at p 312:

> An action may be struck out on the basis that the same cause of action has already been adjudicated (res judicata vis a vis the cause of action or cause of action estoppel) or that an issue has been so determined in a previous suit (res judicata vis a vis the issue or issue estoppel). As Chan Sek Keong CJ explained in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2009] 1 SLR(R) 875 at [13]:
>
> > Res Judicata is based on the important principle of public policy that a cause of action, or an issue necessary to the resolution of a cause of action, which has been finally and conclusively adjudicated on the merits by a court of competent jurisdiction may not be re-litigated by the same parties.
>
> Cause of action estoppel operates where the cause of action has merged into the judgement so that another action may not be brought. As explained by Diplock LJ in *Thoday v Thoday* [1964] P 181 at pp 197–198:
>
> > [C]ause of action estoppel is that which prevents a party from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence of existence of which has been determined by a court of competent jurisdiction in previous between the same parties.
>
> Or, as Lord Keith put it in *Arnold v National Westminster Bank plc* [1991] 2 AC 93, 'cause of action estoppel' arises where the cause of action in the later proceedings is the same as the adjudicated in earlier proceedings, as long as both sets of litigation concerned the same parties or their privies (including successors in title), and provided that both concerned the same subject matter. Cause of actin estoppel provides an absolute bar to relitigation in respect of all points decided in the earlier proceedings, except when fraud or collusion is established so as to negate the judgment in those proceedings.

[21] As regards abuse of process, the usual starting point in any discussion is the rule in *Henderson v Henderson* where Sir James Wigram VC said:

> [where] a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[22] The statement of law above was discussed in *Johnson v Gore Weed & Co*

(a firm) where Lord Bingham observed as follows at para [60]:

> ... *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.

[23] The rule relating to an abuse of process is thus two fold. The first relates to those points which were actually decided by the court; this is res judicata in the strict sense. Secondly, those which might have been brought forward at the time, but were not. The second sense is not a true case of judicata but rather is founded on the principle of public policy in preventing multiplicity or actions; it being in the public interest that there should be an end to litigation; the court will stay or strike out the subsequent action as an abuse of process (per Lord Wilberforce in *Brisbane City Council v A-G for Queensland* [1979] AC 411).

[24] Applying the principles established by authorities above to the circumstances of the present appeal, we consider that the learned judge was correct in allowing the respondent's application to strike out the appellants' suit.

[25] In his grounds of judgment, the learned judge states:

> Jadi pihak-pihak telah pun berhujah panjang lebar berhubung dengan perkara tersebut on the law of estoppel, course of action and all that. Jadi saya telah pun meneliti hujahan yang telah dikemukakan oleh peguam yang terpelajar serta kedudukan undang- undang yang saya faham dan berdasarkan kepada permohonan yang dibuat, saya rasa mahkamah confine mostly pada principle under Order 18

Rule 19 yang mana, yang khususnya pada permohonan ini adalah bahawa berlakunya abuse of process of court dan sama ada memang wujudnya estoppel course of action.

(See p 152 of the appeal record Vol 2.)

[26] The learned judge then referred to the order of encl 362 and states:

Jelas pada mahkamah bahawa based on this order sahaja ia menunjukkan bahawa kuasa tindakan pihak plaintif telah pun ditamatkan secara final dan saya difahamkan bahawa tiada rayuan ataupun rayuan telah pun berhenti di situ sahaja dan oleh itu perintah ini adalah satu perintah yang masih lagi subsisting, ialah berkuatkuasa yang mana telah pun secara denifitenya determine, menamatkan tuntutan pihak plaintif terhadap defendan berhubungnya dengan kuasa tindakan yang mana adalah sama dalam kes ini.

[27] In our view, the learned judge was correct in recognising that the cause in Consolidate Suit No 1412 had been previously determined by the Kuala Lumpur High Court. It is pertinent to note that the earlier cause in Consolidated Suit No 1412 had been previously determined by the Kuala Lumpur High Court not by a simpliciter order of striking out but by an order of recording a dismissal.

[28] Learned counsel for the respondent further submitted that the appellants were guilty of abuse of the process of the court because of 'contumelious conduct' on the part of the appellants. In entering an order of dismissal of the appellants' claim in Consolidated Suit No 1412, the Kuala Lumpur High Court recognised the conduct of the appellants as one 'constituting abuse of process'.

[29] We agree with the submission of learned counsel for the respondent. The court has a discretion to strike out a case as an abuse of process where there has been contumelious conduct on the part of the claimant, that is to say, conduct which shows a deliberate failure to comply with specific orders of the court, or where the claimant was guilty of a series of separate, inordinate and inexcusable delays, in complete disregard of the Rules of the Court (see *Securum Finance Ltd v Ashton* [2000] 3 WLR 1400, *Wallis v Valentine* [2002] EWCA Civ 1034, *Lace Co-ordinates Ltd v NEM Insurance Co Ltd* [1998] All ER (D) 610).

[30] After taking into account the entire factual matrix of the case, we hold that the present suit is barred by a cause of action estoppel and/or an abuse of the court process on the part of the appellants.

[31] In considering the matter, we bear in mind the principle set down by

Keane J in *McCauley v McDermott* 2 ILRM 486 at p 498:

> In cases of this nature, the courts are concerned with achieving a balance between two principles. A party should not be deprived of his or her constitutional right of access to the courts by the doctrine of res judicata where injustice might result, as by treating a party as bound by a determination against his or her interests in proceedings over which he or she had no control. Res judicata must be applied in all its severity, however, where to do otherwise would be to permit a party bound by an earlier judgment to seek to escape from it, in defiance of the principles that there should ultimately be an end to all litigation and that the citizen must not be troubled again by a law suit which has already been decided.

[32] We are of the view that the present action is in fact no more than a repetition, in thinly veiled new guise of the cause of earlier proceedings in Consolidated Suit No 1412 which had been struck off and dismissed.

[33] We are satisfied that the respondent had made good his contention that the institution of the present suit against him is barred by cause of action of estoppel and/or an abuse of court process.

CONCLUSION

[34] In the result, we dismiss the appeal with costs of RM20,000 subject to allocator. We affirm the decision of the learned judge. Deposit to be refunded.

Appeal dismissed with costs of RM20,000 subject to allocator and decision of learned trial judge affirmed.

Reported by Dzulqarnain Ab Fatar